LE COPY

FILED
OCT 15 1958
JAMES R. BROWNING,

No. 338

In the Supreme Court of the United States

OCTOBER TERM, 1958

MARIE GERMAINE ROSE ANNA BISAILLON, PETITIONER

v.

JOSEPH SURECK, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, HONOLULU

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM ANDERSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
WILLIAM J. SCHAFER III,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	1
Statutes and regulation involved	2
Statement	3
Argument	6
Conclusion	8

CITATIONS

Cases:	
Bridges v. *United States*, 346 U. S. 209	6
Jordan v. *De George*, 341 U. S. 223	6
Kaneda v. *United States*, 278 Fed. 694	6
Masaichi Ono v. *Carr*, 56 F. 2d 772	6
United States v. *Schlotfeldt*, 109 F. 2d 106	6
United States v. *Uhl*, 70 F. 2d 792, certiorari denied, 293 U. S. 573	6
Statutes and regulations:	
Immigration and Nationality Act of 1952, § 241 (a) (4) (66 Stat. 204, 8 U. S. C. 1251 (a) (4))	2, 4, 7
40 Stat. 227	6
18 U. S. C. 1542	2, 4, 5, 6, 7
22 U. S. C. 213	6
8 C. F. R. 242.15	3, 7

483497—58

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 338

MARIE GERMAINE ROSE ANNA BISAILLON, PETITIONER

v.

JOSEPH SURECK, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, HONOLULU

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (R. 12–16) are unreported. The opinion of the court of appeals (R. 129–133; Pet. App. 1–7) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1958. The petition for a writ of certiorari was filed on September 5, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the crime of willfully making a false statement in an application for a passport involves moral turpitude.

2. Whether petitioner was denied the right to counsel in the deportation hearing.

3. Whether petitioner was denied full judicial review in that certain discussions in the deportation hearing were made off the record, where the substance of such discussions was testified to by the examiner in the district court.

STATUTES AND REGULATION INVOLVED

Immigration and Nationality Act of 1952, § 241 (a) (4), 66 Stat. 204:

8 U. S. C. 1251 (a) (4):

> (a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who
>
> * * * * * *
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial.

18 U. S. C. 1542:

> Whoever willfully and knowingly makes any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the

issuance of passports or the rules prescribed pursuant to such laws; or

Whoever willfully and knowingly uses or attempts to use, or furnishes to another for use any passport the issue of which was secured in any way by reason of any false statement—

Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

8 C. F. R. 242.15:

The hearing before the special inquiry officer, including the respondent's pleading, the testimony, the exhibits, the special inquiry officer's decision, and all written orders, motions, appeals, and other papers filed in the proceeding shall constitute the record in the case. The hearing shall be recorded verbatim except for statements made off the record with the permission of the special inquiry officer.

STATEMENT

Petitioner, a native and citizen of Canada, was admitted to the United States for permanent residence at St. Albans, Vermont, on December 8, 1947 (Pet. App. 24). Sometime after June 23, 1950, she departed from the United States and re-entered on August 30, 1950, at San Juan, Puerto Rico (Pet. App. 25).

In October of 1955, in the United States District Court for the District of Hawaii, petitioner was convicted and sentenced to serve 18 months imprisonment for a violation of 18 U. S. C. 1542 in that she falsely stated in the application of Florence Paquet for a United States passport that she was not related to Florence Paquet and that she knew her to be a citizen

of the United States (R. 4; Pet. App. 26, 29). In December of 1955, petitioner again was convicted of a violation of 18 U. S. C. 1542 in that she made a false statement in an application for a passport that she was born in Laurin, Montana (R. 4; Pet. App. 27). Petitioner was sentenced to pay a fine of $1,000.00.

Deportation proceedings were commenced against petitioner and on January 4, 1956, a warrant was issued for petitioner's arrest (Pet. App. 21). Petitioner was charged with being deportable under 8 U. S. C. 1251 (a) (4) as an alien who had been convicted of a crime involving moral turpitude within five years after entry and sentenced to confinement for a year or more, and also as one who after entry had been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct (Pet. App. 22, 29, 30). Petitioner promptly retained the services of Elmer E. Poston, lawyer and retired District Director of the Immigration and Naturalization Service for the District of Hawaii, but because of his previous employment the Service questioned Mr. Poston's right to represent petitioner in the deportation proceeding (Pet. App. 16). This question was taken to the Board of Immigration Appeals which decided that Mr. Poston was disqualified from representing petitioner (Pet. App. 19). This ruling was communicated to Mr. Poston on March 17, 1956. On March 19, 1956, Mr. Poston informed the District Director that he had applied to the Board for reconsideration of the ruling (R. 77). On March 20, 1956, the petitioner was informed by the Service that there would be a hearing of her case be-

fore a special inquiry officer on April 9, 1956 (Pet. App. 3, 16, 19, 20). She was told that Mr. Poston was disqualified to represent her but that she might obtain another attorney (Pet. App. 19–20).

At the hearing petitioner was not represented by counsel. When asked whether she desired a continuance to the following day to obtain counsel or whether she would proceed without counsel, petitioner replied that she would proceed (Pet. App. 21). During the hearing, the government entered new charges, actually rewordings of the originals, and petitioner was given a continuance until April 13th to obtain counsel (Pet. App. 29, 30, 31). Petitioner did not obtain counsel and on April 13th she consented to proceed with the hearing (Pet. App. 32, 33, 35). On the basis of petitioner's two admitted convictions under 18 U. S. C. 1542, the special inquiry officer ruled that petitioner was deportable under 8 U. S. C. 1251 (a) (4) (R. 4, 13, 14). On appeal to the Board of Immigration Appeals, where petitioner was fully represented by her present counsel, that decision was upheld (R. 14).

Petitioner then filed in the United States District Court for the District of Hawaii an action for declaratory judgment seeking review of the agency order (R. 3–6). The court found that the determination of the Service was not erroneous and that petitioner had not been denied a fair hearing. It accordingly refused to grant the declaratory relief (R. 17, 120). The court of appeals unanimously affirmed (R. 129–133; Pet. App. 1–7).

1. Petitioner contends that the crime of making a false statement in a passport application does not involve moral turpitude. Under 18 U. S. C. 1542 such a statement is a crime only if made "willfully and knowingly * * * with intent to induce or secure the issuance of a passport * * * contrary to the laws regulating the issuance of passports * * * ." The crime thereby defined would seem no different in its moral aspects from that of perjury, for it is the willful and knowing falsification that is the essential element of both.[1] Perjury, in turn, has uniformly been held to involve moral turpitude. *Kaneda* v. *United States*, 278 Fed. 694 (C. A. 9); *Masaichi Ono* v. *Carr*, 56 F. 2d 772 (C. A. 9); *United States* v. *Schlotfeldt*, 109 F. 2d 106 (C. A. 7); *United States* v. *Uhl*, 70 F. 2d 792 (C. A. 2), certiorari denied, 293 U. S. 573. In addition, the crime defined by 18 U. S. C. 1542 also incorporates all of the elements of fraud, which likewise has been held to involve moral turpitude. *Jordan* v. *De George*, 341 U. S. 223. A knowingly false statement is a crime under 18 U. S. C. 1542 only if made with the specific intent to induce the issuance of a passport in violation of the law—in effect, with an intent to defraud the United States.[2]

[1] Indeed, since passport applications are elsewhere required to be made under oath (40 Stat. 227, 22 U. S. C. 213), a violation of 18 U. S. C. 1542 would normally also constitute perjury.

[2] *Bridges* v. *United States*, 346 U. S. 209, upon which petitioner primarily relies, is irrelevant. The Court held that the gravamen of the offenses there charged, under very different statutory provisions, was mere perjury and an intent to defraud was not an essential element of the crimes, and hence that

Since the crime defined by 18 U. S. C. 1542 necessarily involves moral turpitude, the fact of conviction is all that is required for deportation under 8 U. S. C. 1251 (a) (4). Thus petitioner's contention (Pet. 18) that the particular facts on which she was convicted may not be used to show moral turpitude is immaterial.

2. Petitioner's contention that she was denied the right to be represented by counsel at the deportation hearing (R. 14) is refuted by the record. The counsel originally employed to represent petitioner was disqualified from doing so and the petitioner made no further effort to retain counsel for the hearing. The record shows very clearly that on two occasions the special inquiry officer offered to grant petitioner a continuance so that she could retain counsel but on each occasion she stated that she was willing to proceed without counsel (Pet. App. 21, 35).

3. During the hearing, thirteen discussions were, with the permission or at the suggestion of the special inquiry officer, made off the record (Pet. App. 19, 20, 22, 23, 28, 29, 30, 31, 33, 36). That procedure, commonly employed even in judicial trials, was expressly authorized by 8 C. F. R. 242.15. The examining officer at the hearing testified in the district court that all but a few of these discussions concerned petitioner's efforts to secure counsel (R. 8[illegible]).[3] The dis-

a wartime suspension of the statute of limitations on crimes involving "fraud" did not apply. The Court held neither that 18 U. S. C. 1542 did not require an intent to defraud, nor that "fraud" was essential for moral turpitude.

[3] The others concerned the procedure by which petitioner could obtain copies of the indictments (R. 88, 89) and a request for clarification of an answer (R. 91).

cussions were, as the court of appeals held, "innocuous" (Pet. App. 4), and petitioner has shown no prejudice to her from their omission from the transcript.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
MALCOLM ANDERSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
WILLIAM J. SCHAFER III,
Attorneys.

OCTOBER 1958.

U. S. GOVERNMENT PRINTING OFFICE 1958